No. 21,166

IN THE

United States Court of Appeals

For the Ninth Circuit

INSURANCE COMPANY OF NORTH AMERICA, a corporation,

Appellant,

vs.

ROBERT T. GREENE, et al.,

Appellees.

BRIEF FOR APPELLEES

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STATEMENT OF JURISDICTION

As alleged in Appellant's complaint for declaratory relief (Clerk's Transcript, pp. 1, 2), the defendants Isensee at all times were and now are citizens of the State of Oregon. Defendants Greene are citizens of the State of California. Appellant is a corporation incorporated under and by virtue of the laws of the State of Pennsylvania. The defendants Isensee have filed a lawsuit for personal injuries with a demand in excess of $10,000 in the Superior Court of the State of California, in and for the County of San Mateo, No. 105900, against defendants Greene as a result of an accident which occurred on July 14, 1962. Defendants Greene have demanded coverage of the Appellant

and a defense of the aforesaid lawsuit by virtue of Appellant's Homeowners Policy No. H 15-79-08, which was issued to defendants Greene on July 2, 1962. (Plaintiff's Exhibit No. 3; Clerk's Transcript, pp. 2, 3.) Appellant denies that any coverage exists under the terms of said policy.

28 U.S.C. 2201 provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Art. III, Sec. 2, Clause 1 of the United States Constitution provides in pertinent part:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made or which shall be made, under their Authority; . . . as to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States . . ."

This declaratory relief action was filed in the United States District Court for the Northern District of California (Southern Division) on June 18, 1964. The District Court rendered judgment against the Appellant on June 27, 1966, which judgment was entered by the Clerk on June 30, 1966. (Clerk's Transcript, p. 35.)

28 U.S.C. 1291 provides:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF CASE

On or about July 14, 1962, defendant Robert T. Greene, the son of the defendants Stanley R. Greene and Helen K. Greene, was operating a gasoline motor driven "go-cart". He was involved in an accident with the person of one Charlotte Isensee whereby the latter sustained bodily injury. The place where the accident occurred was at a point fifty feet north of the rear property line of the defendants Greenes' property, and on a private driveway and easement known as the Hickey easement. This easement was used by all parties by permission of the owner (Newmayer) and constituted a private driveway to the Newmayer property.

This easement was parallel to the Greenes' driveway. It was separated from the Greenes' driveway by a redwood fence which extended from Olive Hill Lane in a generally northerly direction to the back property line of the defendants Greenes' premises. The Hickey easement continued northward along the property of Newmayer. A wire fence extended from the northerly end of the wooden fence referred to above, and continued northerly with the Newmayer property. These fences are illustrated in Plaintiff's Exhibits No. 1, 2A,

2B and 2C. There was no break in either fence to allow a vehicle to pass from the defendants Greenes' private driveway to the Hickey easement.

The policy contains the following exclusion (Plaintiff's Exhibit No. 5):

> "This Section does not apply:
> b. under Coverages E and F, to the ownership, maintenance, operation, use, loading and unloading of (1) automobiles or midget automobiles while away from the premises or the ways immediately adjoining . . ."

ISSUES

1. Is the point at which the accident occurred on "a way immediately adjoining" the Greenes' property and therefore covered by Policy No. H 15-79-08?

2. Is Appellant estopped from denying coverage?

ARGUMENT

I.

THE ACCIDENT GIVING RISE TO THE CLAIM OF COVERAGE IN THIS CASE OCCURRED ON "WAYS IMMEDIATELY ADJOINING" WITHIN THE PURVIEW OF THE POLICY.

The term "ways immediately adjoining" is ambiguous and uncertain, and does not attempt to define or apprise the insured of the particular area to which it attaches.

It is elementary in insurance law that any ambiguity or uncertainty in an insurance policy is to be

resolved against the insurer; and that if at all possible the insurance contract will be given such construction as will achieve its object of securing coverage to the insured for losses to which the contract relates. If the insurer uses language which is uncertain, any reasonable doubt will be resolved against it and in favor of the insured. (*Wildman v. Government Employees Insurance Company,* 48 C. 2d 31. Footnotes 2, 3, 4 and cases cited therein.)

The evidence in this case is clear and the Trial Court unequivocally found that the accident in question occurred on the "ways immediately adjoining" the insureds' premises. (Finding of Fact No. 11.)

In *Pacific Employers Insurance Company v. Maryland Casualty Company, American Mutual Liability Insurance Company,* ..... C. 2d ..... (decided November 9, 1966) the California Supreme Court in an unanimous decision dealing with a similar exclusion involving the use of "ways immediately adjoining" has held:

> "The fact that in the instant case liability is limited to operation on the ways immediately adjoining the premises, does not, we think, constitute such a negligible intrusion into the public ways as can be ignored under some de minimis doctrine, as urged by American. The policy does not attempt to define or apprise the insured as to what particular ways are immediately adjoining, either in general terms or as applicable to the insured's particular premises. Whether the immediately adjoining ways are those within 10, 100, 1000 feet, or more, is left to speculation."

The Court further states:

> "In any event, coverage is expressly provided for a use of the public ways, which would be deemed as substantial within a fair interpretation of the policy. The fact that under another interpretation, the policy's coverage might be deemed much narrower, only raises an ambiguity which must be resolved in favor of the insured."

A. The cases relied upon by appellant are not persuasive.

1. The *National Optical Company v. United States Fidelity & Guaranty Company* case, cited as 245 Pac. 343, involves a completely different exclusion than that relied upon in this case.

2. In the case of *Long v. London and Lancashire Indemnity Company of America,* 119 F. 2d 628, the wording "adjacent" which is often used interchangeably with the word "adjoining" was considered by the Court as follows:

> " 'Adjacent is defined as being near, or close at hand; adjoining; bordering.' New Standard Dictionary. It does not at all times mean abutting, but it is usually synonymous with abutting, adjoining, and bordering. * * * It means contiguous, adjoining, lying close at hand, near. *Its precise and exact meaning, however, is determinable principally by the context in which it is used, and the facts of each particular case, or by the subject matter to which it is applied.* 1 Corpus Juris 1196. *The term is a relative one, and hence is necessarily governed by the nature and circumstances of that to which it is applied." Long v. London and Lancashire Indemnity Company of America, supra.* (Emphasis added.)

The terms "ways immediately adjoining" are at best uncertain and ambiguous. Appellant, having caused the ambiguity which exists in the policy under consideration, must have that ambiguity resolved against it. Here, just as in *Pacific Employers Insurance Company v. Maryland Casualty Company, et al., supra,* the policy "does not attempt to define or apprise the insured (Greenes) as to what particular ways are immediately adjoining, either in general terms or as applicable to the insureds' particular premises. Whether the immediately adjoining ways are those within 10, 100, 1000 feet, or more, is left to speculation."

II.

APPELLANT IS ESTOPPED FROM DENYING COVERAGE TO ITS INSURED.

The Appellant admitted coverage under its policy as to Coverage F, the medical-pay portion, which, it states, in its Opening Brief, specifically contained the identical Exclusion on which it relies in order to deny coverage under Coverage E of its policy. (Reporter's Transcript, pp. 14, 15.) In fact, this admission was confirmed by a letter, a copy of which was sent to the defendants, and authorized to be so sent by Appellant. (Defendants' Exhibit B; R.T. pp. 16, 17, 23.)

Furthermore, Appellant at no time notified defendants of its intention to deny coverage until ten months following the accident, at the same time admitting that such an act might jeopardize its insureds' ability to properly defend the claim presented by the Isensees. (Defendants' Exhibit A; R.T. pp. 36, 39.)

It is submitted, therefore, that in the case at bar the evidence shows that the parties at the time of contracting contemplated full coverage for accidents of the type involved. Additionally, Appellant, even following said accident, acknowledged coverage under an identical Exclusion, and thereafter did not deny coverage for an unreasonable period of time.

CONCLUSION

It is respectfully submitted that the Findings and Conclusions of the District Court are amply supported by the evidence and that the decision and judgment rendered in favor of the defendants should be affirmed.

Dated, Redwood City, California,
November 28, 1966.

KANE, OWEN & MELBYE,
By YALE W. ROHLFF,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

YALE W. ROHLFF,
Attorney for Appellees.

(Appendix Follows)

Appendix

Appendix

APPENDIX OF EXHIBITS

Defendants' Exhibits	Identified	Offered	Received
A	10	10	10
B	23	23	23